Supreme Court, U.S.
FILED

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No. _____

THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1994

MARYNELL SNEAD, GAIL MORRIS,

Petitioners,

versus

GOODYEAR TIRE AND RUBBER COMPANY,

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does 29 U.S.C. § 1140 or § 1132(a)(3) entitle ERISA-protected employees to compensatory and punitive damages when their employer discharges them for the purpose of interfering with their right to ERISA benefits in violation of 29 U.S.C. § 1140?

LIST OF ALL PARTIES

The style of the case in the Eleventh Circuit correctly listed the only three parties in this case at the Appellate level:

MARYNELL SNEAD,

Plaintiff-Appellant,

GAIL MORRIS,

Plaintiff-Appellant,

GOODYEAR TIRE & RUBBER CO.,

Defendant-Appellee.

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REFERENCE TO DECISION TO BE REVIEWED

The case to be reviewed is Marynell Snead, Gail Morris v. Goodyear Tire & Rubber Company (11th Cir. 1994) (unpublished opinion), decided by the Eleventh Circuit Court of Appeals on December 09, 1994, a copy of which is attached as Exhibit A.

JURISDICTIONAL GROUNDS

This Court has authority for this review under 28 U.S.C. § 2101 and Rule 10.1(c), Rules of the Supreme Court. The decision below was entered December 09, 1994.

STATUTES

The following Federal statutes are applicable and relevant, and are attached as Exhibits F and G:

29 U.S.C. § 1132;

29 U.S.C. § 1140.

STATEMENT OF THE CASE

During the summer of 1991, James Allen, head of Respondent's Gadsden Plant's Division of Industrial Relations, decided to terminate or lay off Petitioners, who were permanently employed registered nurses, and to replace them in the same jobs with nurses supplied by a temporary employee provider. (Exhibit B, pp 1-2) There was never any question about Petitioners' perofrmance as nurses, and they were not terminated for any reason related to work performance. (Exhibit B, p. 2) Petitioners were replaced, through temporary service providers, by temporary nurses at substantially the same cost as Petitioners' base pay, but without the cost of the ERISA protected health and pension benefits

previously afforded to Petitioners. (Exhibit B, pp. 2-3) Petitioners were notified of their terminations on September 6, 1991, to be effective October 16, 1991. (Exhibit B, p. 3)

Respondent offered to influence the temporary agency to hire Petitioners to fill their old positions at the same base pay but without pension or health benefits, but Petitioners refused. (Exhibit B, p. 3) Petitioners were not offered the opportunity to remain employed by Respondent at reduced salary but with continued benefits. (Exhibit B, p. 3)

Petitioners filed a wrongful discharge claim under ERISA and other claims against Goodyear in the Circuit Court of Etowah County, Alabama on August 18, 1992. The action was timely removed to

the U.S. District Court, Northern District of Alabama. Prior to trial, all claims were dismissed except the ERISA wrongful termination claim under 29 U.S.C. § 1140 (Exhibit E).

In addition to lost wages and benefits, Petitioners claimed compensatory and punitive damages. After bench trial, the trial court entered "Findings of Fact and Conclusions of Law" on 10/21/93 (Exhibit B), which read, in pertinent part:

> In Mertens v. Hewitt Associates, _____ U.S. _____ (1993), the court held that 29 U.S.C. 1132(a)(3) does not provide for the recovery of compensatory or punitive damages.
>
> . . . .
>
> The court finds and concludes that defendant violated 29 U.S.C. § 1140 when it terminated (laid off) the plaintiffs. This conclusion is based on the court's findings that the ERISA

> benefits were specifically considered when the decision was made and defendant's acknowledgement that such consideration constitutes a violation. The court does not conclude that the termination resulted solely from a consideration of ERISA, but does find that defendant specifically intended to reduce the cost of ERISA benefits. . . . The only basis for providing relief is 29 U.S.C. § 1132(a)(3) (except for, possibly, attorney fees). Mertens forecloses the possibility of punitive and/or compensatory damages under this section. (citations omitted)
>
> (pp. 7-9)

Petitioners appealed the court's refusal to consider their claims for compensatory and punitive damages to the Eleventh Circuit. Citing only Mertens and Eleventh Circuit cases for precedent, the appellate court succinctly affirmed the trial court "[b]ecause the plaintiffs' arguments for

compensatory and punitive damages are at odds with both Supreme Court and circuit precedent establishing that ERISA does not authorize such damages." (Exhibit A, p.2)

REASONS FOR ALLOWANCE

Petitioners present a case of first impression as to whether an employer who terminates participants' employment in order to interfere with their attainment of ERISA benefits may be liable for extra-contractual damages.

A. The United States Supreme Court Has Never Decided the Appropriate Measure for Damages Redressing a Violation of 29 U.S.C. § 1140.

The United States Supreme Court has only limited damages recoverable under ERISA claims

involving breach of fiduciary duty. A unanimous Court in Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) held that ERISA preempted all state law claims for breach of fiduciary duty in the processing of beneficiary claims. Id. at 52. In Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), a divided Court limited a beneficiary's relief for a fiduciary's violation of § 1109(a) to contractual damages.[1] In Mertens v.

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[1] Justice Brennan issued a concurring opinion, joined by Justices White, Marshall and Blackman, wherein he stated:

> This does not resolve, of course, whether and to what extent extracontractual damages are available under § 502(a)(3). This question was not addressed by the courts below and was not briefed by the parties and *amici*. Thus the Court properly emphasizes that "we have no occasion to consider whether any other provision of ERISA authorizes recovery of

extracontractual damages." *Ante*, at 3088, n. 5. Accordingly, we save for another day the questions (1) to what extent a fiduciary's mishandling of a claim might constitute an actionable breach of the fiduciary duties set forth in § 404(a), and (2) the nature and extent of the "appropriate equitable relief . . . to redress" such violations under § 502(a)(3).

There is dicta in the Court's opinion, however, that could be construed as sweeping more broadly than the narrow ground of resolution set forth above. Although the Court takes care to limit the binding effect of its decision to the terms of § 409, its opinion at some points seems to speak generally of whether fiduciaries ever may be held personally liable to beneficiaries for extracontractual damages. Moreover, some of the Court's remarks are simply incompatible with the structure, legislative history, and purposes of ERISA. The Court's ambiguous discussion is certainly subject to different readings, and in any event is without controlling significance beyond the question of relief under § 409. I write separately to outline what I believe is the proper approach for courts to take in construing ERISA's provisions and to emphasize the issues left open under today's decision.

105 S.Ct. 3094-3095.

The Court today expressly reserves the question whether extracontractual damages might be one form of "other appropriate relief"

Hewitt Associates, ____ U.S. __ __, 113 S.Ct. 2063, ____ L.Ed.2d ____ (1993), a 5-4 Court decided that § 1132(a)(3) does not authorize suits for money

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under § 502(a)(3). *Ante*, at 3088, n. 5. I believe that, in resolving this and other questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA's equitable remedies. If a requested form of additional relief is available under state trust law, courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme. In addition, courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA -- enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries. See *supra*, at 3095-3096.

105 S.Ct. 3098.

damages against a nonfiduciary who knowingly participates in a fiduciary's breach of fiduciary duty.[2]

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[2] The dissent authored by Justice White states:

> Given this history, it is entirely reasonable in my view to construe § 502(a)(3)'s reference to "appropriate equitable relief" to encompass what was equity's routine remedy for such breaches -- a compensatory monetary award calculated to make the victims whole, a remedy that was available against both fiduciaries and participating nonfiduciaries. Construing the statute in this manner also avoids the anomaly of interpreting ERISA so as to leave those Congress set out to protect -- the participants in ERISA-governed plans and their beneficiaries -- with "less protection than they enjoyed before ERISA was enacted." *Firestone*, 489 U.S., at 114, 109 S.Ct., at 956. Indeed, this is precisely how four Justices of this Court read § 502(a)(3)'s reference to "appropriate equitable relief" in *Russell*.

113 S.Ct. 2074.

> The text of the statute supports a reading of § 502(a)(3) that would permit a court to award compensatory monetary relief where necessary to make an ERISA beneficiary whole for a breach of trust. Such a reading would accord with the established equitable remedies available under the common law of trusts, to which Congress has directed us in construing

The cited cases appear to limit claims for breach of fiduciary duties covered by ERISA to contractual or equitable relief. Congress was primarily concerned with ensuring the performance of fiduciary duties (Russell, 473 U.S. at 140 n.8). However, while the provisions of § 1132(a) focus primarily on remedies appropriate to breach of those duties, they also provide relief from violations of ERISA by non-fiduciaries. Section 1132(a)(3) allows recovery against "any party" for interference

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ERISA, and with Congress' primary goal in enacting the statute, the protection of beneficiaries' financial security against corrupt or inept plan mismanagement. Finally, such a reading would avoid the perverse and, in this case, entirely needless result of construing ERISA so as to *deprive* beneficiaries of remedies they enjoyed prior to the statute's enactment. For these reasons, I respectfully dissent.

113 S.Ct. 2078.

with attainment of ERISA rights. "Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 484 (1990).

This Court has never decided the appropriate limits of relief provided by ERISA for a 29 U.S.C. § 1140 violation when an employee is discharged or subjected to discrimination for the purpose of interfering with ERISA-protected rights.

B. The Supreme Court Has Suggested that Monetary Damages Are Available to § 1140 Claimants Where the Bad Actor is "Any Person" Other than a Fiduciary.

Although several cases limit the extent of damages allowable for a fiduciary's breach of ERISA, one case details at length the Court's apparent approval of extra-contractual damages for § 1140 violations. In McClendon, the Court considered whether ERISA preempted state law claims arising from a wrongful discharge committed to avoid making contributions to a pension plan.

Justice O'Connor wrote for a unanimous Court:

> This case presents the question whether [ERISA] preempts a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA.
>
> Petitioner Ingersoll-Rand employed respondent Perry McClendon as a salesman and distributor of construction equipment. In 1981, after

McClendon had worked for the company for nine years and eight months, the company fired him citing a companywide reduction in force. McClendon sued the company in Texas state court, alleging that his pension would have vested in another four months and that a principal reason for his termination was the company's desire to avoid making contributions to his pension fund. . . . McClendon sought compensatory and punitive damages under various tort and contract theories; he did not assert any cause of action under ERISA.

. . . . .

The [Texas Supreme Court] noted that federal courts had held similar claims preempted by ERISA, but distinguished the present case on the basis that McClendon was "not seeking lost pension benefits but [was] seeking future lost wages, mental anguish and punitive damages as a result of the wrongful discharge."

. . . . .

McClendon's claim falls squarely within the ambit of ERISA § 510, which provides:

> "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

By its terms § 510 protects plan participants from termination motivated by an employer's desire to prevent a pension plan from vesting. Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits. We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510.

. . . . .

Of particular relevance [to the preemption inquiry] is § 502(a)--ERISA's civil enforcement mechanism. That section . . . provides, in pertinent part:

> "A civil action may be brought--
>
> "(3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."

In Pilot Life we examined this section at some length and explained that Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510.

. . . . .

> Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide.(emphasis in original) (citations omitted)
>
> 111 S.Ct. at 481, 485, 486.

The McClendon Court did not decide the issue at hand. However, the quoted passages reveal that it decided the preemption issue by reasoning that Congress had fashioned in 1132(a)(3) an exclusive remedy for an employer's violation of 1140. The Court further reasoned that this exclusive remedy allowed federal courts to provide the same full relief -- compensatory and punitive damages -- afforded by state courts in wrongful discharge actions. Thus, the

McClendon Court suggested that federal courts might provide expansive remedies under §1132(a)(3) for victims of § 1140 violations.

C. Absent Direct Supreme Court Precedent, Lower Courts Have Ignored the Guidance of McClendon and Improperly Extended the Reach of Mertens.

The trial court and Eleventh Circuit both held that Mertens foreclosed the possibility of extra-contractual damages in this case. However, Mertens analyzed the reach of an equity court solely in a trust setting, determining only whether ERISA authorized suits "for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." ____ U.S. ____, 113 S.Ct. at 2066. This Court has noted that "the crucible of congressional concern was misuse and

mismanagement of plan assets by plan administrators and that ERISA was designed to prevent these abuses in the future. Russell, 473 U.S. at 140 n. 8. At the same time, one core concern of Congress was that employers should not be permitted to avoid becoming fiduciaries by interfering with the attainment of rights. McClendon, supra. at 485.

Because § 1140 makes "any person" liable for violation of ERISA rights separately from liability for breach of fiduciary duty under §§ 1105 and 1109(a), and because Mertens analyzed only a nonfiduciary's liability for knowing participation in breach of §1109 duties, courts cannot properly rely on the Mertens decision for the proposition that extra-contractual damages are not permitted for

§ 1140 violations. Nevertheless -- McClendon having decided only a preemption issue -- some lower courts have borrowed and extended Mertens' damages holding to cover McClendon facts despite this Court's clear guidance to the contrary.

D. A Decision on the Merits of this Case Is Necessary.

Absent this Court's direct construction of § 1132(a)(3) under the facts at hand, a major interpretive gap will continue to plague the lower courts and practitioners. The lower courts will be unable to confidently assess what damages should lie for a nonfiduciary's willful breach of the statute. For these and the following reasons, Petitioners beg the Court to grant their petition:

1. The conflict between McClendon and Mertens has created an air of uncertainty as to what damages are available when an employer discriminates against an employee in order to interfere with ERISA-protected benefit rights.

2. Uncertainty as to the nature of recovery allowable under § 1132(a)(3) for a violation of § 1140 has created an air of uncertainty in the area of employer/ employee relations.

3. Deciding this issue is necessary to determine whether employers, acting in a non-fiduciary capacity, will be protected by ERISA from penalties

normally associated with wrongful termination.

4. §§ 1140 and 1141 referring to violations of those sections as "unlawful," an employer's willful violation of § 1140 for the purpose of interfering with ERISA benefits being in the nature of a fraud, and the purpose of ERISA being to protect employee rights to their benefits, permitting extra-contractual damages would allow proper "redress" without rewriting Congress' statute.

5. Extra-contractual relief for a § 1140 violation could impose no penalty upon

a fiduciary or upon a benefit plan for errors made in good faith, and would impose no costs upon such plans; thus, permitting extra-contractual damages would not contravene Congress' intent to contain pension costs. See, e.g., Mertens, 113 S.Ct. at 207.

6. Absent the High Court's examination of the meaning of McClendon, employers will be able to impoverish -- and even beggar -- employees who have traded an irretrievable portion of their lives in reliance on promised benefits with impunity, since the lower courts could

provide no more than limited contractual relief.

7. The purpose of ERISA and § 1140 is to protect employees who are entitled to ERISA-protected benefits and pensions. By restricting damages against employers, the courts are protecting illegal actions of employers instead of protecting rights and benefits of employees.

CONCLUSION

The facts of this case are extreme. However, they are daily repeated by large employers in the belief that the greatest penalty afforded by law will be mere restitution and reinstatement. The Mertens

majority, citing earlier Courts, strove to maintain the balance struck by Congress between "the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs." Id. The primary goal can only be achieved by allowing lower courts to award whatever relief is required to "redress" § 1140 violations pursuant to the mandate of §1132(a)(3). The subsidiary goal will not be hampered by allowing such damages, as fiduciary and cofiduciary breaches are not governed by §1140.

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APPENDIX

TO PETITION FOR WRIT OF CERTIORARI

IN THE CASE OF:

MARYNELL SNEAD, GAIL MORRIS,

Petitioners,

versus

GOODYEAR TIRE AND RUBBER COMPANY,

Respondent.

Decision to be Reviewed (Exhibit A)

District Court Findings of Fact and Conclusionsof Law (Exhibit B)

District Court Final Judgment (Exhibit C)

District Court Memorandum Opinion on

Motions to Remand and Dismiss (Exhibit D)

District Court Order Dismissing Certain Claims and Denying Remand (Exhibit E)

29 U.S.C. § 1132(a) (Exhibit F)

29 U.S.C. § 1140 (Exhibit G)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6048
Non-Argument Calendar
D. C. Docket No. 92-PT-2082 M

MARYNELL SNEAD, GAIL MORRIS,

Plaintiffs-Appellants,

versus

GOODYEAR TIRE & RUBBER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(December 9, 1994)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

This ERISA case presents two issues on appeal: (1) whether the district court correctly rejected the plaintiffs' contention that they should be authorized under ERISA to sue for compensatory damages for mental distress and for punitive damages, and (2) whether the district court abused its discretion in deducting from the plaintiffs' back pay award the amount the plaintiffs would have been paid if they had accepted the defendant's offer to continue working.

Because the plaintiffs' arguments for compensatory and punitive damages are at odds with both Supreme Court and circuit precedent establishing that ERISA does not authorize such

damages,[1] we affirm the district court's judgment on this issue.

The plaintiffs' second contention is that the district court should have awarded them more back pay than the amounts they received even though they turned down Goodyear's offer to continue working for Goodyear through the employment service. Concerning this issue, the district court held:

> Defendant offered to have the plaintiffs fill their positions through the contract provider, but both plaintiffs declined .... The plaintiffs could have stayed employed under the new system, brought this action for

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[1] See Mertens v. Hewitt Associates, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); McRae v. Seafarers' Welfare Plan, 920 F.2d 819 (11th Cir. 1991), reh'g denied, 931 F.2d 901 (11th Cir. 1991); Bishop v. Osborn Transportation, Inc., 838 F.2d 1173 (11th Cir. 1988), cert. denied, 488 U.S. 832, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988).

> relief, and suffered no significant harm. They elected another route. (R2-79-3, 9).

In sum, the district court held that the plaintiffs were to be made whole except to the extent of the amounts they would have been paid if they had not rejected the defendant's offer. Our review of the record persuades us that the plaintiffs' attack on this finding of the district court is baseless. It was well within the district court's discretion to exclude from the plaintiffs' back pay award the amount of money they would have been paid if they had accepted the offer to continue working. Accordingly, we affirm the judgment of the district court as it pertains to this issue.

AFFIRMED.

(s&m-1 cd1)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MARYNELL SNEAD and
GAIL MORRIS,

PLAINTIFFS,

V. CV92-PT-2082-M

GOODYEAR TIRE & RUBBER CO.,

DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard at a bench trial. The sole issues are (1) whether defendant violated 29 U.S.C. 114O in terminating the plaintiffs; and (2) the nature and extent of the relief to which plaintiffs are entitled, if there has been such a violation. The defendant has acknowledged, on the record, that if its

agent terminated the plaintiffs with a specific intent to save the cost of funding ERISA benefits, defendant would have violated § 1140. Because of this acknowledgment, the court has not otherwise considered whether the law so provides. The court will thus first address whether plaintiffs have proved such intent.

Claimed Violation

It is undisputed that the decision to terminate the plaintiff was made solely by the head of defendant's Gadsden Plant's Division of Industrial Relations, James Allen.[1] Allen was first employed by

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[1] The court may confuse whether divisions or departments are at the higher level. The court understands that the higher

defendant in 1977. He came to the Gadsden plant in March 1989. There had been general discussions that the Gadsden plant was not cost competitive. The Plant Manager had stated that the division heads needed to be cost conscious and reduce costs.

During the summer of 1991, Allen, as the sole decisionmaker (except for the general "cost conscious" instructions) decided to terminate or lay off the plaintiffs, who were permanently employed registered nurses, and to replace them, in the same jobs, with nurses supplied by a temporary employee

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level "divisions" at the Gadsden plant are: (1) Industrial Relations (2) Development (3) Quality Assurance (4) Production (5) Finance (6) Engineering (7) others? If the court has divisions and departments reversed, it is of no consequence. "Hospital" was under Allen. The plaintiffs were in "Hospital."

provider who would employ the nurses and contract with defendant to fill the jobs with the provider's employees.

There was never any question about plaintiffs' performance as nurses. The court finds that they were good nurses and were not terminated for any reason related to work performance. Plaintiffs were replaced, through temporary service providers, by temporary LPN's at substantially the same cost as plaintiffs' base pay. The plaintiffs were notified of their terminations on September 6, 1991.[2] The

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[2] Sheila Dean, the head nurse, did not recommend the terminations and did not know of them until the day before the announcement of the terminations. No supervisor below Allen recommended the terminations. No supervisor above him specifically recommended them. He may have felt some general pressure from above to cut costs. His decision to terminate the plaintiffs was based solely on his desire to

terminations were effective October 16, 1991. The defendant did not offer the plaintiffs an opportunity to remain as salaried employees at reduced pay, but with continued benefits. The defendant reserved the right to influence the decision as to whom the temporary agencies would provide as replacements. It could have insisted on the plaintiffs being given the jobs and apparently wished to retain them. Defendant offered to have the plaintiffs fill their positions through the contract provider, but both plaintiffs declined. The contract provider filled plaintiffs' old jobs with "temporary" nurses.

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reduce costs. According to Allen, he had no real insight to how this cost reduction would result except as to a reduction in payroll taxes and vacation time. (There could have been some possible savings in administrative costs and in future cross the board raises.) There was no actual analysis.

Defendant paid the provider substantially the same base pay per employee as it had been paying the plaintiffs. If the plaintiffs had accepted the defendant's offer to remain employed under the new arrangement, they would have received a significant base pay. Defendant would not have paid the employer's share of payroll taxes and would not have contributed, as it did before, to fund certain ERISA benefits for plaintiffs.

There is at least one type of financial report to which Allen had access prior to his making the termination decisions. It was a report which compared budgeted costs to actual costs.[3] The

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[3] Referred to in the testimony as BVA's.

BVA's were prepared by the defendant's Gadsden plant Finance Office on a monthly basis. These reports were started in 1989, about the time Allen arrived in Gadsden. The parties acknowledge that the BVA's contained at least eight line items of ERISA type benefits. The undisputed evidence is that the cost of all these benefits were allocated to divisions, not on an actual cost basis but under a system whereby total costs were distributed based on such factors as numbers of employees, square footage, etc. The item for vacation costs includes accrued, but not taken, vacation. It does not include costs of replacements for employees on vacation. Although many of the costs stated on the BVA reports were distributed costs, Allen, at the time of

his decision, thought they were actual costs charged to his division.

Defendant provided, in response to plaintiffs' interrogatories, Px. 86. These combined exhibits (entitled Cost Of Fringe Benefits Per Hour, The Goodyear Tire and Rubber Company Gadsden Plant) reflect allocated costs attendant to employees at the plant. These documents were not available, as such, to Allen at the time he made his decision. They were prepared for this litigation. The exhibit reflects the following per hour totals with regard to ERISA and non-ERISA fringe benefits.

	ERISA	Non-ERISA
1988	$4.18	$ .14 1/2

1989	$4.42	$ .29
1990	$4.81	$ .32
1991	$5.40	$ .38

This data reflects, of course, that ERISA benefits attendant to the cost of permanent employees far exceeded non-ERISA benefit costs. The defendant is self-insured as to medical benefits. There is no funding until medical costs are incurred.

Although Allen acknowledges that the sole purpose of the layoffs was to save costs attendant to plaintiffs' employment, he denies that cost savings related to ERISA benefits was a factor in his decision. He acknowledges that he made no specific cost analysis, but just assumed that there would be a

savings in payroll taxes and that the savings in payroll taxes justified the decision. According to him, he gave no consideration to ERISA benefits. While this court does not enjoy making what could be perceived as credibility choices, it goes with the territory. While Allen says that he gave no specific consideration to ERISA benefits, there are several factors which would suggest that he did, albeit not by specific analysis. Although the court does not find that Allen deliberately testified falsely, the court does conclude that because ERISA benefits were not specifically analyzed, Allen may now be led to think that he gave them no consideration.

The factors which suggest that, more likely so than not so, Allen specifically considered the ERISA benefits include:

(1) The wide disparity between the dollar amounts attributable to ERISA benefits and those lower amounts which Allen says that he did consider.

(2) The fact that Allen saw BVA reports and thought, at the time of his decision, that the charges were actual, not distributed.

(3) The fact that the amount in hourly payments to the provider(s) for LPNs, except for benefits, was approximately the same as plaintiffs were being paid.

(4) Allen had a long time career in an area involving personnel management and likely had an awareness of the significance of benefits.

(5) The common knowledge that benefits are a significant part of an employment package.

(6) The fact that there was some pressure from above to reduce costs. Within a short time after the decisions, the company began making written benefits comparisons.

(7) There was no question about plaintiffs' work performance.

(8) The fact plaintiffs could have continued to work under the new system. Defendant retained the right to influence such decisions. There were no written contracts with the providers.

(9) Plaintiffs were not offered the opportunity to stay at reduced salary with benefits.

Relief

Plaintiffs seek enforcement pursuant to 29 U.S.C. 1132(a)(3). 29 U.S.C. § 1140 provides that "Section 1132 of this title shall be applicable in the enforcement of this section." The only portion of § 1132 which this court can conclude has application

to relief or remedy is § 1132(a)(3) (§ 502(a)(3)).[4] In Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 150 (1985), Justice Brennan, in a concurring opinion, stated that the Court was saving for another day "the nature and extent of the 'appropriate equitable relief . . . to redress' such violations under § 502(a)(3)."[5] The court has now answered that saved question.

In Mertens v. Hewitt Associates, ____ U.S. ____ (1993), the Court held that 29 U.S.C.

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[4] Except, of course, for the attorney fees provisions.

[5] Justice Brennan also stated that 29 U.S.C. § 1109 protects the plan, not individuals. *Id.* Thus, the possibility that § 1109 and § 1132(a)(2) may allow for, in addition to "equitable" relief, "remedial" relief, provides no answer here. The fact that 502(a)(3) makes no reference to "remedial" relief suggests a restriction to "equitable" relief. See note 8 of the majority opinion in *Mertens, infra.*

1132(a)(3) does not provide for the recovery of compensatory or punitive damages. While there may be Circuit court cases prior to Mertens which suggest to the contrary, it is not necessary for this court, in view of Mertens, to determine if the facts in those cases are distinguishable from those here. Note 7 in the amended decision of McRae v. Seafarers, 920 F.2d 819, 821 (11th Cir. 1991), seems to have been a precursor of Mertens. The Eleventh Circuit rejected the argument that Ingersoll-Rand v. McClendon, 111 S.Ct. 478 (1990) provided to the contrary of the ultimate holding in Mertens. Plaintiffs' suggestion that the majority in Mertens did not address the damages issue is not well taken. Even the dissenters in Mertens seem to suggest that punitive damages are

not available under § 1132(a)(3). See dissenters' note 6 and cases cited therein. See also majority opinion, note 7.

Ultimate Findings And Conclusions

The court finds and concludes that defendant violated 29 U.S.C. § 1140 when it terminated (laid off) the plaintiffs. This conclusion is based on the court's finding that the ERISA benefits were specifically considered when the decision was made and defendant's acknowledgement that such consideration constitutes a violation. The court does not conclude that the terminations resulted solely from a consideration of ERISA, but does find that defendant specifically intended to reduce the cost of

ERISA benefits. See Seaman v. Arvida Realty Sales, 985 F.2d 543 (11th Cir. 1993). This case is comparable to Seaman in that the employees were offered an opportunity for continued association on a non-employee basis. The only basis for providing relief in 29 U.S.C. § 1132(a)(3) (except for, possibly, attorney fees).[6] Mertens forecloses the recovery of

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[6] Plaintiffs have acknowledged that "*In Ingersol-Rand, supra* the U.S. Supreme Court stated that 29 U.S.C. 1132(a) is the exclusive remedy for violations of 29 U.S.C. 1140:

> In *Pilot Life* we examined this section at some length and explained that Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510.

Id. at 485.

> Of particular relevance in this inquiry is § 502(a) -- ERISA's civil enforcement mechanism. That section as set forth in 29 U.S.C. §§ 1132(a)(3), provides, in pertinent part:

punitive and/or compensatory damages under this section.[7] This court does not reach the issue of whether mental anguish or punitive damages would

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> A civil action may be brought ... (3) by a participant ... (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan....

Id. at 485.

From the above language, the Supreme Court seems to imply that 29 U.S.C. 1132(a)(3) is the basis for relief for violation of 29 U.S.C. 1140." (Quoted from plaintiffs' brief).

[7] Cases which predate and are inconsistent with *Mertens* are neither controlling nor persuasive. The Supreme Court clearly addressed the language of § 1132(a)(3). Plaintiffs' attorney is persistent. He represented the plaintiff in *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988). The trial court found a violation of 29 U.S.C. § 1140, but held that *no* provision of § 1132 provides for the recovery of extra-contractual damages. *Mertens* simply puts the icing on the *Bishop cake*. Plaintiffs have inexplicably argued that Bishop "has no meaning" to a § 1140 claim.

be appropriate, in any event, under these facts. The plaintiffs could have stayed employed under the new system, brought this action for relief and suffered no significant harm. They elected another route.

The court concludes that the plaintiffs should be reinstated with no loss of benefits or back pay. Since they did not mitigate their damages by remaining employed, they are not entitled to any back pay except to the extent of the difference, if any, between the amount they were earning plus any cost of living raises, etc., less what they could have earned during this period as temporary employees and what they have earned in other jobs for periods in which the

amounts would have exceeded the temporary job pay to the extent of any such excess.

Within ten days, the defendant will, consistent with this opinion, file and serve a proposed judgment which includes such amounts as are contemplated by these findings and conclusions[8] and a provision for reinstatements, with benefits accrued retroactive to date of termination. In general, plaintiffs are to be made whole except to the extent, as indicated, they did not mitigate their damages. Plaintiffs will have ten days to object to the proposed judgment. There is no need for plaintiffs to object to anything which is consistent with these findings and conclusions,

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[8] The court places this burden on defendant because, initially, it may be in a better position to calculate the amounts.

only as to amounts, etc. which are arguably inconsistent herewith.

This 21st day of October, 1993.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

(s&m-1.cd2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MARYNELL SNEAD and
GAIL MORRIS,

Plaintiffs,

v. CIVIL ACTION NO. 92-PT-2082-M

GOODYEAR TIRE & RUBBER COMPANY,

Defendant.

FINAL JUDGMENT

In conformity with the Findings of Fact and Conclusions of Law entered in this case on October 21, 1993 and at the hearing on November 22, 1993, it is hereby ORDERED, ADJUDGED, and DECREED that:

A. REINSTATEMENT:

1. Within fifteen (15) calendar days following the entry of this Judgment, each of the plaintiffs shall be reinstated to employment with the defendant in the position of Plant Nurse with credited service for the period since their termination on October 16, 1991 and with full service rights as though they had not been laid off or terminated on October 16, 1991.

2. In the event either or both of the plaintiffs does/do not desire reinstatement, the plaintiffs' attorney shall so notify the defendant's attorney on or before December 20, 1993.

B. BENEFITS:

Within thirty (30) calendar days following the entry of this Judgment, the defendant

shall take the following steps for the restoration of benefits:

3. Pension Plan: The defendant shall fund the Salaried Employees Pension Plan with the following amounts which would have been contributed by the defendant to such pension plan if the plaintiffs had been working since October 16, 1991:

Marynell Snead: $2,288

Gail Morris: $1,300

4. Vacation Pay: The defendant shall pay to the plaintiffs the amounts which they would have paid during their vacations since October 16, 1991. The plaintiffs have been paid vacation pay in 1991. The amounts of the vacation pay the

plaintiffs would have received in 1992 and 1993 are as follows:

Marynell Snead: $4,864.60

Gail Morris: $2,813.52

5. Savings Plan: The defendant shall fund the Savings Plan with the following amounts which would have been contributed by the defendant with respect to the plaintiffs had they been working since October 16, 1991:

Marynell Snead: $1,130.55

Gail Morris: $ 819.06

6. Health Care Coverage: The plaintiffs continued to be covered by the Flex-Choice Health Care Plan for one year to October 16, 1992. Neither has incurred any expense for COBRA continuation or replacement insurance since October

16, 1992. During the period since October 16, 1992, they incurred the following health care expenses:

Marynell Snead: $ 112

Gail Morris: $1,016.50

The defendant shall pay such amounts to the plaintiffs.

C. BACK PAY:

7. If plaintiff Marynell Snead had accepted the offer to continue to work as a contract nurse, she would have had her pay 100% supplemented up to her base pay through the SUB Plan for a period of 171.3 weeks, or 3 years and 3 months to January 16, 1995. (Plaintiff's Exhibit No. 13). In accordance with the Court's finding on the failure to mitigate issue, such plaintiff is not due any

back pay except that for the period from October 16, 1991 to March 1, 1993 (when she obtained a higher paying job at Baptist Medical Hospital in Gadsden, Alabama), she is due back pay representing the amount she would have received in overtime pay computed on her base rate. Based on the stipulation of the parties, such amount is found to be $2,860.12.

8. If plaintiff Gail Morris had accepted the offer to remain as a contract nurse, she would have had her pay 100% supplemented up to her base pay for a period of 97.9 weeks, or 1 year and 10-1/2 months to August 31, 1993. (Plaintiff's Exhibit No. 18). In accordance with the Court's finding on the failure to mitigate issue, such plaintiff is not due back pay except that (a) for the period from September 1, 1993 (when the SUB

supplementation would have expired) to December 31, 1993, she is due back pay representing the difference between the amount she would have earned as a contract nurse without the SUB supplementation and the amount she would have earned in base pay during such period; and (b) for the period from October 16, 1991 to December 31, 1993, she is due back pay representing the amount she would have received in overtime pay computed on her base rate. Based on the stipulation of the parties, the total of such amounts is found to be $6,263.66.

D. AMOUNTS TO BE PAID TO THE PLAINTIFFS:

9. The amounts to be paid to the plaintiffs in accordance with this Judgment are as follows:

	Marynell Snead	Gail Morris
Back pay	$2,860.12	$6,263.26
Vacation pay	4,864.60	2,813.52

Medical expenses	112.00	1,016.50
Total	$7,836.72	$10,093.28

10. Such amounts shall be paid within thirty (30) days following the entry of this Judgment.

11. The parties have stipulated to the above figures and plaintiffs have waived prejudgment interest on these sums.

E. COSTS:

12. Costs authorized by 28 U.S.C. § 1920 are taxed against the defendant.

DONE and ORDERED this 17th day of December, 1993.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MARYNELL SNEAD and
GAIL MORRIS,

PLAINTIFFS,

V. CV-92-PT-2082-M

GOODYEAR TIRE & RUBBER CO.,

DEFENDANT.

MEMORANDUM OPINION

This cause comes on to be heard on plaintiffs' Motion To Remand filed on September 14, 1992 and defendant's Motion To Dismiss filed on September 9, 1992.

Plaintiffs have dismissed Counts III and V of their complaint.

Count I of the complaint includes the following allegation: "She [Maynell Snead) was told that she would have free lifetime medical coverage after 25 years service with Defendant if her job was eliminated or after 30 years of service with Defendant."

Count II includes the same allegation with reference to plaintiff Gail Morris.

Count IV makes a specific ERISA type claim with respect to both plaintiffs (discharge for the purpose of interfering with and/or preventing them from obtaining future lifetime medical benefits, etc.) The case was obviously removable because of Count IV if nothing else.

The portions of Counts I and II which claim ERISA benefits are obviously preempted. See

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) and cases cited therein.[1] Ingersoll-Rand appears to specifically call for the preemption of Count V.

What is more problematical is whether the alleged breach of contract claims, unrelated to benefits, in Counts I and II, are preempted. These claims may be "wholly remote in content" from the ERISA plan. See Clark v. Coats & Clark, Inc., 865 F.2d 1237, 1242-45 (11th Cir. 1989) and full discussion therein.

The court concludes that the portions of Counts I and II which claim benefits are clearly preempted by ERISA and any state claims related

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[1] *See also Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989).

thereto will be dismissed. The court does not so conclude with regard to the termination claims of Counts I and II. The court will retain supplemental jurisdiction with reference to such claims. Any state claims with reference to Count IV are preempted and will be dismissed. All claims related thereto in Count IV will be construed as ERISA claims.

This 2nd day of December, 1992.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

(s&m-1 cd4)

IN THE UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

MARYNELL SNEAD and
GAIL MORRIS,

PLAINTIFFS,

V. CV92-PT-2082-M

GOODYEAR TIRE & RUBBER CO.,

DEFENDANT.

ORDER

This cause comes on to be heard on plaintiffs' Motion To Remand filed on September 14, 1992 and defendant's Motion To Dismiss filed on September 9, 1992. In accordance with a Memorandum filed contemporaneously herewith,

1. Counts III and V are **DISMISSED**.

2. All claims with reference to Count IV except ERISA claims are **DISMISSED**.

3. State claims related to benefits in Counts I and II are **DISMISSED**. The motion to dismiss with regard to state termination claims in Counts I and II is **OVERRULED**.

The benefits claims in Counts I and II will be treated as ERISA claims. The court retains supplemental jurisdiction of the state termination claims in Counts I and II. The motion to remand is **DENIED**.

DONE and **ORDERED** this 2 day of December, 1992.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Marynell Snead and
Gail Morris,

Plaintiffs,

V. CV:92-PT-2082-M

Goodyear Tire & Rubber Company,

Defendant.

MEMORANDUM OPINION

This cause comes to be heard on defendant's, Goodyear Tire and Rubber Company, Motion for Summary Judgment on any Claims in Counts I and II arguably unrelated to ERISA filed on February 16, 1993.

employee benefit plan if it has a connection with or reference to such a plan.

Plaintiffs, in counts I and II, are alleging a state common law breach of contract claim against Goodyear. Plaintiffs allege that Goodyear breached its contract to employ them for as long as Goodyear remained in Gadsden and/or as long as they wanted to work for Goodyear.[4] Therefore, plaintiffs allege, when Goodyear terminated them it breached this alleged contract.[5]

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[4] Whereas, count IV of plaintiffs' complaint alleges that Goodyear terminated them so it would not have to provide them ERISA type benefits i.e. medical benefits.

[5] In Clark, supra, the court considered whether the "conduct at issue" was effected in connection with the administration of benefits in an employee benefit plan. The "conduct at issue" in plaintiffs' breach of contract claim relates to representations by Goodyear that plaintiffs had a job as long as Goodyear was in Gadsden and/or as long as they wanted to work for Goodyear.

Plaintiffs' deposition testimony does indicate that one of the reasons for bringing this lawsuit is the allegation that they were terminated so that Goodyear would not have to provide them medical benefits. While it may be argued that the alleged contract claims (except for the personnel manual claims) are inextricably intertwined with the ERISA retirement or lifetime benefit claims, for reasons hereinafter stated, it is not necessary to decide the preemption issue.

BREACH OF CONTRACT CLAIM

Plaintiffs argue that they were not employees at will for the following primary reasons:[6]

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[6] Plaintiffs have alleged a number of other reasons why they were not employees at will:

(1) Goodyear has a practice and reputation for providing job security and generous retirement benefits to salaried employees.

(A) Goodyear has an employee manual which provides for discharges only for cause.

(b) Plaintiffs have been promised generous retirement benefits after retirement by Goodyear when they were hired and during their employment at Goodyear.

Defendant argues, alternatively, that if there is any claim in counts I and II "wholly remote in content" from an employee benefit plan, it would

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(2) Plaintiffs have relied on the offer of secure employment and generous retirement benefits for many years.

(3) The Goodyear plant in Gadsden has not discharged a salaried employee without cause in the past 22 years.

(4) Goodyear replaced plaintiffs with lower paid contract labor who were less qualified. Plaintiffs' jobs were not eliminated.

(5) Goodyear's stated reason for terminating plaintiffs was to reduce costs.

(6) Plaintiffs were excellent employees and their job performance and character were not factors in their discharge.

These assertions do not give rise to an employment contract under current Alabama law. See Udcoff v. Friedman, 615 So.2d 436 (Ala. 1993); Howard v. Wolff Broadcasting Corp., 611 So.2d 307 (Ala. 1992).

> be accepted.. Indeed, if the employer does not wish the policies contained in an employee handbook to be construed as an offer for a unilateral contract, he is free to so state in the handbook.

Id. at 734 (emphasis supplied). See Lee v. City of Gadsden, 592 So.2d 1036, 1037 n.3 (Ala. 1992) (unilateral employment contract can be performed by an employee' s performance and reliance upon an employer's offer).

The court concludes that the Personnel Manual for Salaried Employees for the Akron Headquarters and Manufacturing Plants (Personnel Manual) did not constitute an employment contract for the following reasons. Plaintiff Snead testified that she never reviewed or looked at the Personnel Manual until her lawyer showed it to her. (Snead Depo. pgs. 121-22, 132) . Snead further testified that

fail as a matter of law because the plaintiffs were employees at will and the employment at will doctrine has been recently adhered to by the Alabama Supreme Court.

This court will address each of plaintiffs' contentions.

GOODYEAR HAS AN EMPLOYEE MANUAL WHICH PROVIDES FOR DISCHARGES ONLY FOR CAUSE.

In Hoffman-LaRoche, Inc. v. Campbell, 512 So.2d 725 (Ala. 1987), the Alabama Supreme Court addressed whether language in an employee manual or handbook can give rise to an employment contract. The court stated:

> to become a binding promise, the language used in the handbook must be specific enough to constitute an actual offer rather than a mere general statement...it is axiomatic that an offer must be communicated before it may

she was never provided a Personnel Manual so she never specifically read or saw the provision relating to termination. Id. at 7. Plaintiff Morris also testified that she was not provided a Personnel Manual, so she never specifically read or saw the provision relating to the termination. (Morris Depo. pg. 7).

The evidence indicates that the plaintiffs have not reviewed or specifically read the Personnel Manual that allegedly arose to an employment contract. Since the plaintiffs did not read the Personnel Manual before bringing this lawsuit, the court concludes that no offer was communicated to them for them to accept. See Hoffman, supra. Moreover, plaintiffs have not

offered any evidence indicating that they relied on statements in the Personnel Manual.[7]

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[7] Another possible reason for concluding that the Personnel Manual did not constitute an employment contract is the fact that it contained a disclaimer provision stating that the Personnel Manual was not a contract. Moreover, this provision specifically authorized Goodyear to change or terminate any provision in the Personnel Manual. This provision provides that:

> The Company reserves the right to change or terminate any provision or to add new provisions at any time without prior notice. The provisions contained in this manual are not intended to create nor be construed to constitute a contract of continued employment or future employment with any employee or employees.

See Hanson v. New Technology, Inc., 594 So.2d 96, 99 Ala. 1992) (Alabama Supreme Court held that a disclaimer provision prevented the employee handbooks from reasonably being construed as an employment contract); Abney v. Baptist Medical Centers, 597 So.2d 682 (Ala. 1992) (disclaimer in personnel manual prevented manual form constituting an employment contract) ; Stinson v. American Sterilizer Co., 570 So.2d 618, 621-22 (Ala. 1990) (disclaimer in employee handbook reserving the company's right to deviate from all stated policies could not reasonably be construed as an employment contract). Since plaintiffs never read or considered the personnel manual or relied upon it, it is not necessary for the court to consider

PLAINTIFFS HAVE BEEN PROMISED GENEROUS RETIREMENT BENEFITS AFTER RETIREMENT BY GOODYEAR WHEN THEY WERE HIRED AND DURING THEIR EMPLOYMENT AT GOODYEAR.

Plaintiffs testified that Goodyear represented to them that they would have their jobs as long as the plant remained in Gadsden and/or as long as they wanted to work at Goodyear. Plaintiff Snead testified that Jim Miller, manager of Goodyear's labor department, told her that Goodyear hoped she would stay as long as she wanted and led her to believe that she would have her job as long as the plant was in Gadsden. Snead further testified that Miller told her she would have medical benefits if

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whether the disclaimer was in a personnel manual which plaintiffs read and relied upon.

she stayed until retirement. (Snead Depo. pg. 47-48). Plaintiff Morris also testified that Miller told her that she had her job as long as she wanted and medical benefits upon retirement. (Morris Depo. pg. 39).

In Hoffman, supra, the court set forth what must be shown to establish that an employment contract is one other than one terminable at will:

> (1) that there was a clear and unequivocal offer of lifetime employment or employment of definite duration, Bates v. Jim Walter Resources, Inc., 418 So.2d 903 (Ala. 1982); (2) that the hiring agent had authority to bind the principal to a permanent employment contract, Alabama Mills, Inc. v. Smith, 237 Ala. 296, 186 So. 699 (1939); and (3) that the employee provided substantial consideration for the contract separate from the services

> rendered, United Security Life Ins. Co. v. Gregory, 281 Ala. 264, 201 So. 2d 853 '1967).

Id. at 728.

In Schneider v. Russell Corp., 823 F.2d 422 (11th Cir. 1987), the Eleventh Circuit addressed whether an employee's testimony as to conversations dealing with lifetime employment were "clear and unequivocal" under Alabama law. The court examined whether an employer's offer to an employee that his job "is good until [he] retire[d] or die[d]" constituted an unequivocal offer of lifetime employment. The court stated:

> Here, Schneider's testimony as to the conversation dealing with lifetime employment, which we accept as true on a motion for summary judgment, clearly stated an agreement that Schneider would continue as a commission salesman under the stated terms "as

> long as he wanted" or, "as long as he desired" language which *Chastain* treated as sufficient under the Alabama Law as outlined in *Alabama Mills*.

Id. at 426.

See Green v. City of Hamilton Housing Authority, 937 F.2d 1561, 1564 (11th Cir. 1991) (under Alabama law, "permanent" employment means employment for as long as the employer is in business); But see Chastain v. Kelly-Springfield Tire Co., 733 F.2d 1479, 1484 (11th Cir.1984) (employer must use clear and unequivocal terms before a court concludes that employer intended to enter into an employment contract). See generally Lee v. City of Gadsden, 592 So.2d 1036, 1038 (Ala. 1992) (offer must be clear and unequivocal); Hickenbottom v. Preferred Risk Mutual Ins., 514 So.2d 881, 882

(Ala. 1987) (oral contract that contains no specifics concerning term, length, or duration is considered one of employment at will).

Goodyear has met its Celotex burden.[8] Plaintiffs, however, have not offered any evidence that they provided substantial consideration for the alleged employment contract separate from ,the services rendered[9] or that Jim Miller had

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[8] Goodyear argues that Russell is not controlling because in Russell the employee expressly asked, with reference to having a protected territory, "and this is good until I retire or die?" and received an affirmative answer. Goodyear argues that this case is more akin to Chastain v. Kelly-Springfield Tire Co., 733 F.2d 1479 (11th Cir. 1984). In Chastain, the court rejected that claim that statements by the employer such as "[your] jobs are secure . . . [i]f [the employee] does [the] job" did not constitute a "clear and unequivocal offer."

[9] There are two acceptable forms of such consideration: "the employee's relinquishment of a prior claim against the employer, or the employee's relinquishment of prior 'substantial' employment with knowledge of such relinquishment by the employer." Lee v. City of Gadsden, 592 So.2d 1036, 1039 (Ala. 1992) (footnote omitted).

authority to bind Goodyear to a permanent employment. Since plaintiffs have failed to make a showing sufficient to establish the existence of an element essential to the party's case, an entry of summary judgment is appropriate. Celotex, 477 U.S. at 322-23. Plaintiffs have failed to establish all the essential elements for a valid employment contract.

CONCLUSION

Therefore, all that remains is their ERISA claim. Consequently, defendant's Motion for Summary Judgment on any Claims in Counts I and II arguably unrelated to ERISA will be **GRANTED**.

DONE and ORDERED this 4th day of May, 1993.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

(s&m-1.cd5)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Marynell Snead and
Gail Morris,

Plaintiffs,

V. CV:92-PT-2082-M

Goodyear Tire & Rubber Company

Defendant.

ORDER

In accordance with the Memorandum opinion filed contemporaneously herewith, the defendant's Motion for Summary Judgment on any Claims in Counts I and II Arguably Unrelated to ERISA is **GRANTED**.

DONE and ORDERED this 4th day of May, 1993.

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

29 U.S.C. § 1132(a)

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this

subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (I) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (I) of this section.

29 U.S.C. § 1140

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry to proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

(2)

Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

No. 94-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARYNELL SNEAD, GAIL MORRIS,
Petitioners,

v.

GOODYEAR TIRE AND RUBBER COMPANY,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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35 P

QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court should depart from recent Supreme Court precedent, the consistent holdings of the Circuits, and the plain language of the statute and authorize the recovery of compensatory and punitive damages under 29 U.S.C. §1132(a)(3) in ERISA actions.

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No. 94-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARYNELL SNEAD, GAIL MORRIS,

Petitioners,

v.

GOODYEAR TIRE AND RUBBER COMPANY,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision by the Court of Appeals for the Eleventh Circuit in *Marynell Snead, Gail Morris v. Goodyear Tire and Rubber Co.*, Appeal No. 94-6048 (December 9, 1994) is unpublished. A copy is set forth in the Appendix on pages A-1 through A-2. The Final Judgment entered on December 17, 1993 and the Findings of Fact and Conclusions of Law entered on October 21, 1993 in Civil Action No. CV-92-PT-2082-M by the United States District Court for the Northern District of Alabama are set forth in the Appendix on pages A-3 through A-15.

RELEVANT STATUTE

Since in this case petitioners urge the Court to depart from the plain language of the ERISA civil enforcement statute, it is appropriate to set out the precise language of the statute. 29 U.S.C. §1132(a) provides in its entirety as follows:

(a) *Persons empowered to bring a civil action*

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for the appropriate relief under section 1109 of this title;

(3) *by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;*

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act

or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection. (emphasis added).

STATEMENT OF THE CASE

This case arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. (ERISA). Petitioners were (and are now again) Plant Nurses at respondent Goodyear Tire and Rubber Company's plant in Gadsden, Alabama. A decision having been made to use contract Nurses on the shifts on which the petitioners were employed, they were offered but declined the opportunity to continue working as contract Nurses. Following their rejection of the offer, they were laid off and replaced by contract Nurses in October 1991. As a result of the District Court's ruling in this case, they were reinstated in January 1994 to the Plant Nurse job, where they remain employed.

Following their layoff in October 1991, they filed a multi-count complaint in State Court alleging violations of ERISA, fraud, the tort of outrage (intentional infliction of emotional

distress), and breach of contract. After removal to Federal Court, they voluntarily dismissed the fraud and outrage counts. The breach of contract counts were dismissed on summary judgment.

The case was tried at bench trial on the ERISA claims. The District Court entered findings of fact and conclusions of law on October 21, 1993 in favor of petitioners on their ERISA claims. (A -7-15). Applying this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) and Circuit precedent, the Court held that petitioners were not entitled to compensatory and punitive damages pursuant to 29 U.S.C. §1132(a)(3). (A - 12, 13-14). Final Judgment was entered on December 17, 1993 (A -3-6) granting the following equitable relief to petitioners:

> (a) They were ordered reinstated to employment, credited with full service as though they had not been terminated. (A - 3).
>
> (b) Respondent was ordered to grant them the employee benefits with which they would have been credited had they remained employed, including retroactive contributions to the pension plan, the savings plan, and credit for vacation pay. (A - 4-5).
>
> (c) Respondent was ordered to reimburse them for medical expenses they incurred which would have been covered by the employee health insurance plan. (A - 4).
>
> (d) They were awarded back pay, reduced by the amount they would have earned if they had accepted the offer to continue working as contract Nurses. (A - 5).
>
> (e) Their counsel received an attorneys' fee award, the amount being arrived at by agreement.

They then appealed to the Eleventh Circuit on the issues of (a)whether ERISA authorizes compensatory and punitive dam-

ages and (b)whether it was within the Trial Court's discretion to reduce the back pay award by the amount they would have earned had they accepted the offer to continue working. The Court of Appeals affirmed on both issues. On the only issue raised by the petition for certiorari — whether ERISA provides for compensatory and punitive damages — the Court of Appeals held that:[1]

> "Because the plaintiffs' arguments for compensatory and punitive damages are at odds with both Supreme Court and circuit precedent establishing that ERISA does not authorize such damages, we affirm the district court's judgment on this issue." (A - 1-2).[2]

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[1] Petitioners do not contest the Court of Appeals' decision on the reduction of back pay by the amount they would have earned if they had not rejected the offer to continue working.

[2] The Court cited *Mertens v. Hewitt Associates*, 508 U.S. _____, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991), and *Bishop v. Osborn Transportation*, 838 F.2d 1173 (11th Cir. 1988), *cert. denied*, 488 U.S. 832 (1988).

REASONS FOR DENYING THE WRIT

By their petition for certiorari, petitioners are asking this Court to re-visit an issue which it conclusively decided only two years ago in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) and which the Courts of Appeals have resolved consistently and without conflict. Petitioners are further asking this Court to grant certiorari for the purpose of judicially re-writing the plain and express language of a statute. For these reasons, the petition for writ of certiorari is due to be denied.

I.

THE SUPREME COURT HAS ALREADY DECIDED THE ISSUE

The issue on which petitioners urge certiorari is whether the ERISA civil enforcement statute, 29 U.S.C. §1132(a), authorizes the recovery of compensatory and punitive damages. This precise issue was considered and decided in 1993 in *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993). The holding in *Mertens* — that ERISA does not authorize an action for damages against a nonfiduciary for alleged participation in a breach of fiduciary duty — was premised on the Court's conclusion that the term "equitable relief" in §1132(a)(3) does not encompass compensatory damages. The Court stated as follows:

> "Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory damages — monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, or course, the classic form of *legal* relief. *Curtis v. Loether*, 415 U.S. 189, 196 ... (1974); *Teamsters v. Terry*, 494 U.S. 558, 570-571 ... (1990); *D. Dobbs*, Remedies §1.1, p. 3 (1973). And though we have never interpreted the precise phrase 'other appropriate equitable relief,' we have construed the similar language of

> Title VII of the Civil Rights Act of 1964 (before its 1991 amendments) — 'any other equitable relief as the court may deem appropriate,' 42 U.S.C. §2000e-5(g) — to preclude 'awards for compensatory or punitive damages.' *United States v. Burke*, 504 U.S. ___, ___, 119 L.Ed.2d 34, 112 S.Ct. 1867 (1992)." (508 U.S. at ___, 124 L.Ed.2d at 169-70).

The holding in *Mertens* that §1132(a)(3) does not authorize recovery of extra-contractual damages is squarely on point and dispositive of this case. Given this Court's resolution of the issue raised here in *Mertens*, there is absolutely no reason to grant a writ of certiorari.

Petitioners attempt to sidestep *Mertens* by arguing that it involved a non-fiduciary's potential liability for participation in a breach of fiduciary duty while this case involves a termination of employment contrary to 29 U.S.C. §1140. Their theory is that this Court has never explicitly ruled on the availability of compensatory and punitive damages under §1132(a)(3) in the context of a §1140 suit.[3]

The distinction sought to be drawn by petitioners between the remedies sought in *Mertens* and the remedies available in a §1140 suit simply does not exist. The potential remedies are the same both in the context of a non-fiduciary's liability for breach of fiduciary duty and in the context of a §1140 suit. The petitioners in *Mertens* relied exclusively on §1132(a)(3) as support for their contention that extra-contractual damages were

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[3] Petitioners' brief states that "because *Mertens* analyzed only a nonfiduciary's liability for knowing participation in breach of §1109 duties, courts cannot properly rely on the *Mertens* decision for the proposition that extra-contractual damages are not permitted for §1140 violations." (Petitioners' brief pp. 20-21).

available.[4] Similarly, petitioners here also rely solely on §1132(a)(3) in support of their claim for extra-contractual damages. (A - 12, 13). Since *Mertens* held that extra-contractual damages are not available under §1132(a)(3), it follows that they are not available under §1132(a)(3) regardless of the nature of the underlying claim.

Accordingly, a grant of certiorari in this case would serve only to re-tread a worn path with needless repetition of an established principle.

II.

THE PLAIN TERMS OF THE STATUTE

The result which this Court reached in *Mertens* and which the Court of Appeals applied in the present case accurately reflects the plain terms of the statute. Section 1132(a)(3) is phrased solely in terms of suits "to obtain other appropriate *equitable* relief," and makes no mention of money damages. This Court has previously held that remedies not expressly mentioned in the ERISA enforcement statute are not to be inferred. In *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), the Court stated as follows:

> "The six carefully integrated civil enforcement provisions found in §502(a) of the statute as finally enacted, however, provide strong evidence that Congress did not

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[4] The Court in *Mertens* stated as follows: "Lacking equivalent provisions specifying *non*fiduciaries as potential defendants, or damages as a remedy available against them, petitioners have turned to §502(a)(3), 29 U.S.C. §1132(a)(3) ...." (508 U.S. at _____, 124 L.Ed.2d at 168). The Court further characterized petitioners' reliance on §1132(a)(3) as follows: "Petitioners contend that requiring respondents to make the Kaiser plan whole ... would constitute 'other appropriate equitable relief' within the meaning of §502(a)(3)," and "[p]etitioners maintain that the object of their suit is 'appropriate *equitable* relief' under §502(a)(3)." (508 U.S. at _____, 124 L.Ed.2d at 168, 169) (emphasis in original).

intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 361 ... (1980).

* * *

"We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 ... (1979): '[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'

* * *

"In contrast to the repeatedly emphasized purpose to protect contractually defined benefits, there is a stark absence — in the statute itself and in its legislative history — of any reference to an intention to authorize the recovery of extra-contractual damages." (473 U.S. at 146-148) (footnotes omitted).

Accordingly, petitioners are asking the Court not only to depart from the recent resolution of the issue in *Mertens* but further to re-write the statute.

III.

NO CIRCUIT SPLIT

There is furthermore no reason to grant certiorari in this case because there is no conflict among the Courts of Appeals which have considered the issue of the availability of compensatory and punitive damages under §1132(a)(3). The Circuits consistently hold that such damages are not authorized, as shown by the following:

First Circuit: *Drinkwater v. Metropolitan Life Insurance Co.*, 846 F.2d 821, 824 (1st Cir.), *cert. denied* 488 U.S. 909 (1988).

Second Circuit: *Mullins v. Pfizer, Inc.*, 23 F.2d 663, 666 (2nd Cir. 1994).

Fourth Circuit: *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

Fifth Circuit: *Medina v. Anthem Life Insurance Co.*, 983 F.2d 29, 32-3 (5th Cir.), *cert. denied*, 114 S.Ct. 66, 126 L.Ed.2d 35 (1993); *Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1338 (5th Cir.), *cert. denied*, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1462-64 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 and 479 U.S. 1089 (1987).

Sixth Circuit: *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987).

Seventh Circuit: *Harsch v. Eisenburg*, 956 F.2d 651, 656-57 (7th Cir.), *cert. denied*, 113 S.Ct. 61, 121 L.Ed.2d 29 (1993); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 626-27 (7th Cir. 1987).

Eighth Circuit: *Novak v. Andersen Corp.*, 962 F.2d 757, 759-60 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 2928, 124 L.Ed.2d 678 (1993).

Ninth Circuit: *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986).

Tenth Circuit: *Lafoy v. HMO Colorado*, 988 F.2d 97, 100 (10th Cir. 1993).

Eleventh Circuit: *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173, 1174 (11th Cir.), *cert. denied*, 488 U.S. 832 (1988);

McRae v. Seafarers' Welfare Plan, 920 F.2d 819, 821 (11th Cir.), *reh'g denied*, 931 F.2d 1021 (11th Cir. 1991).

In light of this consistent body of Circuit precedent, it is inexplicable for petitioners to argue that there is an "interpretive gap" that "will continue to plague the lower courts" because they "will be unable to confidently assess what damages should lie for a nonfiduciary's willful breach of the statute." (Petitioners' brief p. 21). If there is an interpretive gap, the Courts of Appeals are unaware of it. Indeed, every Circuit Court which has considered the issue after *Mertens* has interpreted *Mertens* to foreclose the availability of compensatory and punitive damages. *Mullins v. Pfizer, Inc.*, 23 F.3d 663, 666 (2nd Cir. 1994) ("ERISA does not authorize suits for money damages against nonfiduciaries."); *Buckley Dement, Inc. v. Travelers Plan Administrators of Illinois, Inc.*, 39 F.3d 784, 787-88 (7th Cir. 1994) (*Mertens* forecloses recovery of monetary amounts for a claims administrator's breach of fiduciary duty); *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994) (reversing award of compensatory damages under §1132(a)(3) in light of *Mertens*) (petition for certiorari filed March 6, 1995 (63 USLW 3672)); *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1520 (9th Cir. 1993) ("As the Supreme Court recently held, equitable relief in the form of the recovery of compensatory damages is not an available remedy under 29 U.S.C. §1132(a)(3) ... ."). No useful purpose would be served by again reviewing an issue which the Courts have accurately held was resolved by *Mertens*.

Moreover, the "interpretative gap" argument advanced by petitioners is nothing more than a repetition of their misplaced argument that *Mertens* did not settle the issue and a contention that the remedies available in §1132 actions should vary depending on the type of claim being asserted in each case. In effect, petitioners are asking the Court to hold that compensatory and punitive damages are available for some ERISA claims and are not available for other ERISA claims, regardless of the fact that

the ERISA civil enforcement statute [§1132(a)] provides the same remedies for all causes of action. Petitioners' approach is both unnecessary and impracticable. It is unnecessary because the only remotely possible source of money damages under ERISA, for any ERISA cause of action, is §1132(a)(3), and *Mertens* has held that extra-contractual damages are not authorized by that section. It is impracticable because it would result in a hodgepodge of rules setting the stage for different types of relief under §1132(a)(3) depending on the nature of the underlying ERISA cause of action. There is no "interpretive gap" today, but there certainly would be if the petitioners' approach were followed. In sum, petitioners have advanced no reason why *Mertens* should not stand as the definitive interpretation of §1132(a)(3).

IV.

INGERSOLL-RAND DOES NOT CONSTITUTE APPROVAL OF COMPENSATORY AND PUNITIVE DAMAGES

In an argument best described as wishful thinking, petitioners say that *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) approved extra-contractual damages for §1140 violations. Petitioners' theory is that the term "relief" in the sentence "[i]t is clear that the relief requested here is well within the power of federal courts to provide" (498 U.S. at 145) refers to compensatory and punitive damages. Their idea is misplaced for the following reasons:

First, if *Ingersoll-Rand* meant that compensatory and punitive damages are authorized by ERISA, this Court obviously would at the least have considered that approach when it subsequently decided *Mertens*. Since there is no such consideration in *Mertens* (*See* 124 L.Ed.2d at 173), it logically follows that this Court does not share petitioners' view of *Ingersoll-Rand*.

Second, the Circuits which have considered this contention — the Fifth, Seventh, and Eleventh Circuits — are in agreement that

Ingersoll-Rand does not authorize compensatory or punitive damages. *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), *reh'g denied*, 931 F.2d 1021 (11th Cir. 1991); *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 61, 121 L.Ed.2d 29 (1992); *Medina v. Anthem Life Ins. Co.*, 983 F.2d 29 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 66, 126 L.Ed.2d 35 (1993). The interpretation placed on *Ingersoll-Rand* by these Circuit Courts is best set forth in *McRae*, *supra*, as follows:

> "The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's cause of action for wrongful termination. The Supreme Court is not holding that the specific *remedies* this plaintiff had sought under state law are necessarily the remedies that will be afforded him should he be granted the *relief* under ERISA §502." (920 F.2d at 821, n. 7).

Third, even if *Ingersoll-Rand* were viewed as authority for compensatory and punitive damages, there would remain no reason to grant the certiorari petition in the present case. That is so because *Mertens*, decided after *Ingersoll-Rand*, provides the definitive resolution of the issue and supersedes any arguably inconsistent statements in *Ingersoll-Rand*. Being more recent, *Mertens* is the case which provides the guidance on the question of the availability of compensatory and punitive damages under §1132(a)(3).

CONCLUSION

There is no reason for this Court to grant the Petition for Writ of Certiorari. This Court has already ruled on the issue on which review is sought, the terms of the statute are plain, and there is no split of authority in the Circuit Courts of Appeals.

Accordingly, the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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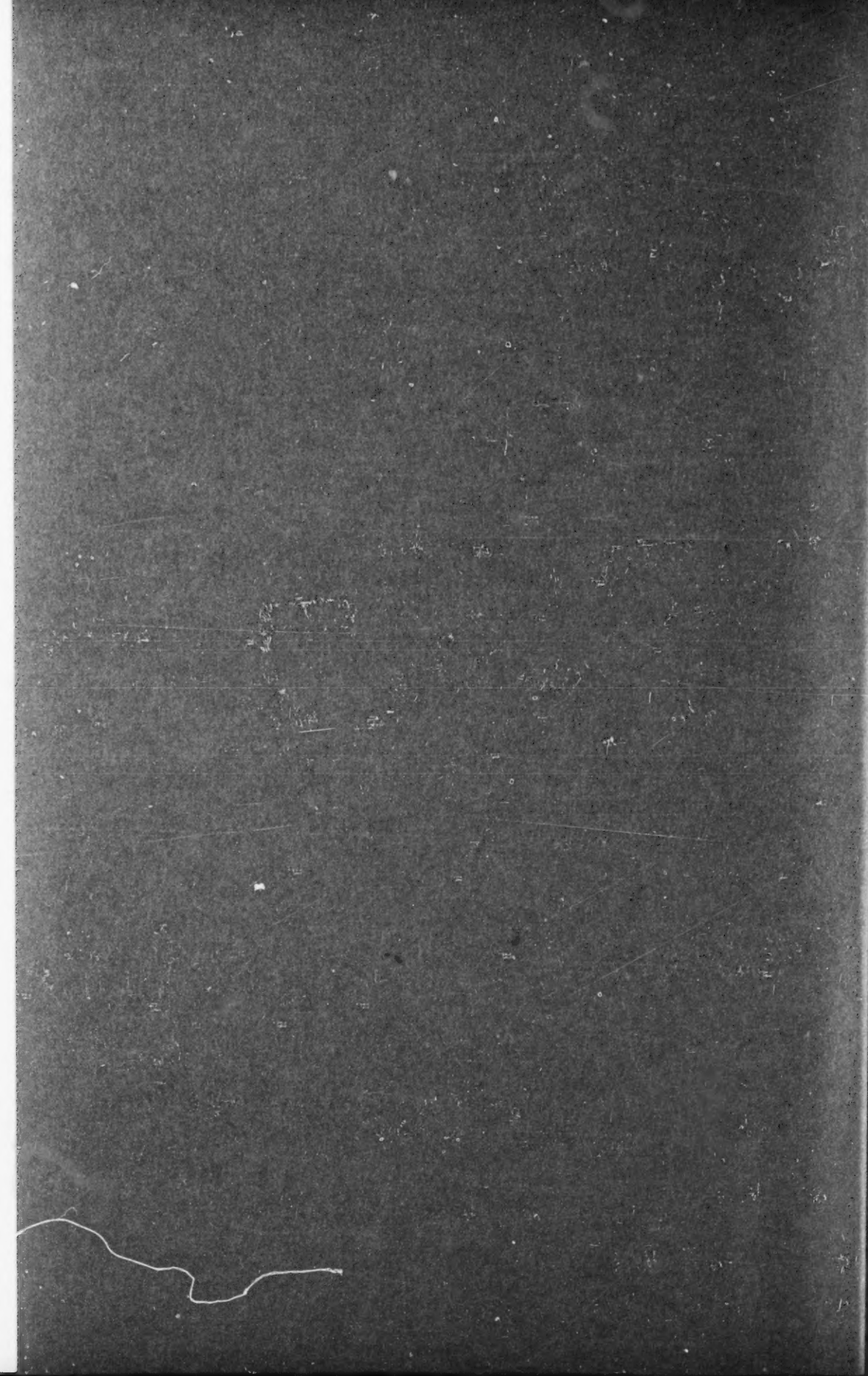

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-6048
Non-Argument Calendar
D. C. Docket No. 92-PT-2082

MARYNELL SNEAD, GAIL MORRIS,
Plaintiffs-Appellants,

versus

GOODYEAR TIRE & RUBBER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(December 9, 1994)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

This ERISA case presents two issues on appeal: (1) whether the district court correctly rejected the plaintiffs' contention that they should be authorized under ERISA to sue for compensatory damages for mental distress and for punitive damages, and (2) whether the district court abused its discretion in deducting from the plaintiffs' back pay award the amount the plaintiffs would have been paid if they had accepted the defendant's offer to continue working.

Because the plaintiffs' arguments for compensatory and punitive damages are at odds with both Supreme Court and circuit

precedent establishing that ERISA does not authorize such damages,[1] we affirm the district court's judgment on this issue.

The plaintiffs' second contention is that the district court should have awarded them more back pay than the amounts they received even though they turned down Goodyear's offer to continue working for Goodyear through the employment service. Concerning this issue, the district court held:

> Defendant offered to have the plaintiffs fill their positions through the contract provider, but both plaintiffs declined . . . The plaintiffs could have stayed employed under the new system, brought this action for relief, and suffered no significant harm. They elected another route. (R2-79-3, 9).

In sum, the district court held that the plaintiffs were to be made whole except to the extent of the amounts they would have been paid if they had not rejected the defendant's offer. Our review of the record persuades us that the plaintiffs' attack on this finding of the district court is baseless. It was well within the district court's discretion to exclude from the plaintiffs' back pay award the amount of money they would have been paid if they had accepted the offer to continue working. Accordingly, we affirm the judgment of the district court as it pertains to this issue.

AFFIRMED.

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[1] *See Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993); *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991); *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988) *cert. denied*, 488 U.S. 832, 109 S.Ct. 90, 102 L.Ed.2d 66 (1988).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION
92-PT-2082-M

MARYNELL SNEAD and GAIL MORRIS,
Plaintiffs,

v.

GOODYEAR TIRE & RUBBER COMPANY,
Defendant.

FINAL JUDGMENT

[Entered: Dec. 17, 1993]

In conformity with the Findings of Fact and Conclusions of Law entered in this case on October 21, 1993 and at the hearing on November 22, 1993, it is hereby ORDERED, ADJUDGED, and DECREED that:

A. REINSTATEMENT

1. Within fifteen (15) calendar days following the entry of this Judgment, each of the plaintiffs shall be reinstated to employment with the defendant in the position of Plant Nurse with credited service for the period since their termination on October 16, 1991 and with full service rights as though they had not been laid off or terminated on October 16, 1991.

2. In the event either or both of the plaintiffs does/do not desire reinstatement, the plaintiffs' attorney shall so notify the defendant's attorney on or before December 20, 1993.

B. BENEFITS

Within thirty (30) calendar days following the entry of this Judgment, the defendant shall take the following steps for the restoration of benefits:

3. *Pension Plan:* The defendant shall fund the Salaried Employees Pension Plan with the following amounts which would have been contributed by the defendant to such pension plan if the plaintiffs had been working since October 16, 1991:

Marynell Snead	$2,288
Gail Morris:	$1,300

4. *Vacation Pay:* The defendant shall pay to the plaintiffs the amounts which they would have been paid during their vacations since October 16, 1991. The plaintiffs have been paid vacation pay in 1991. The amounts of the vacation pay the plaintiffs would have received in 1992 and 1993 are as follows:

Marynell Snead:	$4,864.60
Gail Morris:	$2,813.52

5. *Savings Plan:* The defendant shall fund the Savings Plan with the following amounts which would have been contributed by the defendant with respect to the plaintiffs had they been working since October 16, 1991:

Marynell Snead:	$1,130.55
Gail Morris:	$ 819.06

6. *Health Care Coverage:* The plaintiffs continued to be covered by the Flex-Choice Health Care Plan for one year to October 16, 1992. Neither has incurred any expense for COBRA continuation or replacement insurance since October 16, 1992. During the period since October 16, 1992, they incurred the following health care expenses:

Marynell Snead: $ 112

Gail Morris: $1,016.50

The defendant shall pay such amounts to the plaintiffs.

C. BACK PAY

7. If plaintiff Marynell Snead had accepted to offer to continue to work as a contract nurse, she would have had her pay 100% supplemented up to her base pay through the SUB Plan for a period of 171.3 weeks, or 3 years and 3 months to January 16, 1995. (Plaintiff's Exhibit No. 13). In accordance with the Court's finding on the failure to mitigate issue, such plaintiff is not due any back pay except that for the period from October 16, 1991 to March 1, 1993 (when she obtained a higher paying job at Baptist Medical Hospital in Gadsden, Alabama), she is due back pay representing the amount she would have received in overtime pay computed on her base rate. Based on the stipulation of the parties, such amount is found to be $2,860.12.

8. If plaintiff Gail Morris had accepted the offer to remain as a contract nurse, she would have had her pay 100% supplemented up to her base pay for a period of 97.9 weeks, or 1 year and 10-1/2 months to August 31, 1993. (Plaintiff's Exhibit No. 18). In accordance with the Court's finding on the failure to mitigate issue, such plaintiff is not due back pay except that (a) for the period from September 1, 1993 (when the SUB supplementation would have expired) to December 31, 1993, she is due back pay representing the difference between the amount she would have earned as a contract nurse without the SUB supplementation and the amount she would have earned in base pay during such period; and (b) for the period from October 16, 1991 to December 31, 1993, she is due back pay representing the amount she would have received in overtime pay computed on her base rate. Based on the stipulation of the parties, the total of such amounts is found to be $6,263.66.

D. AMOUNTS TO BE PAID TO THE PLAINTIFFS:

9. The amounts to be paid to the plaintiffs in accordance with this Judgment are as follows:

	Marynell Snead	Gail Morris
Back pay	$2,860.12	$ 6.263.26
Vacation pay	4,864.60	2,813.52
Medical Expenses	112.00	1,016.50
Total	$7,836.72	$10,093.28

10. Such amounts shall be paid within thirty (30) days following the entry of this Judgment.

11. The parties have stipulated to the above figures and plaintiffs have waived prejudgment interest on these sums.

E. COSTS

12. Costs authorized by 28 U.S.C. § 1920 are taxed against the defendant.

DONE and ORDERED this 17th day of December, 1993.

/s/ Robert B Propst
ROBERT B. PROPST
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CV92-PT-2082-M

MARYNELL SNEAD and GAIL MORRIS,
PLAINTIFFS,

v.

GOODYEAR TIRE & RUBBER CO.,
DEFENDANT.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Oct. 21, 1993]

This cause came on to be heard at a bench trial. The sole issues are (1) whether defendant violated 29 U.S.C. § 1140 in terminating the plaintiffs; and (2) the nature and extent of the relief to which plaintiffs are entitled, if there has been such a violation. The defendant has acknowledged, on the record, that if its agent terminated the plaintiffs with a specific intent to save the cost of funding ERISA benefits, defendant would have violated § 1140. Because of this acknowledgment, the court has not otherwise considered whether to law so provides. The court will thus first address whether plaintiffs have proved such intent.

Claimed Violation

It is undisputed that the decision to terminate the plaintiffs was made solely by the head of defendant's Gadsden Plant's Division of Industrial Relations, James Allen.[1] Allen was first

[1] The court may confuse whether divisions or departments are at the higher level. The court understands that the higher level "divisions" at the Gadsden plant are: (1) Industrial Relations (2) Development (3) Quality Assurance (4) Production (5) Finance (6) Engineering (7) Others?

(Footnote 1 continued on next page)

employed by defendant in 1977. He came to the Gadsden plant in March 1989. There had been general discussions that the Gadsden plant was not cost competitive. The Plant Manager had stated that the division heads needed to be cost conscious and reduce costs.

During the summer of 1991, Allen, as the sole decision maker (except for the general "cost conscious" instruction), decided to terminate or lay off the plaintiffs, who were permanently employed registered nurses, and to replace them, in the same jobs, with nurses supplied by a temporary employee provider who would employ the nurses and contract with defendant to fill the jobs with the provider's employees.

There was never any question about plaintiffs' performance as nurses. The court finds that they were good nurses and were not terminated for any reason related to work performance. Plaintiffs were replaced, through temporary service providers, by temporary LPN's at substantially the same cost as plaintiffs' base pay. The plaintiffs were notified of their termination on September 6, 1991.[2] The terminations were effective October

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(Footnote 1 continued)

The "departments" within Allen's division were (1) Labor (2) Hospital (3) Training (4) Janitorial (5) Industrial Relations (6) Safety (7) Security (8) Insurance (9) Others? If the court has divisions and departments reversed, it is of no consequence. "Hospital" was under Allen. The plaintiffs were in "Hospital."

[2] Sheila Dean, the head nurse, did not recommend the terminations and did not know of them until the day before the announcement of the terminations. No supervisor below Allen recommended the terminations. No supervisor above him specifically recommended them. He may have felt some general pressure from above to cut costs. His decision to terminate the plaintiffs was based solely on his desire to reduce costs. According to Allen, he had no real insight to how this cost reduction would result except as to a reduction in payroll taxes and vacation time. (There could have been some possible savings in administrative costs and in future cross the board raises.) There was no actual analysis.

16, 1991. The defendant did not offer the plaintiffs an opportunity to remain as salaried employees at reduced pay, but with continued benefits. The defendant reserved the right to influence the decision as to whom the temporary agencies would provide as replacements. It could have insisted on the plaintiffs being given the jobs and apparently wished to retain them. Defendant offered to have the plaintiffs fill their positions through the contract provider, but both plaintiffs declined. The contract provider filled plaintiffs' old jobs with "temporary" nurses. Defendant paid the provider substantially the same base pay per employee as it had been paying the plaintiffs. If the plaintiffs had accepted the defendant's offer to remain employed under the new arrangement, they would have received a significant base pay. Defendant would not have paid the employer's share of payroll taxes and would not have contributed, as it did before, to fund certain ERISA benefits for plaintiffs.

There is at least one type of financial report to which Allen had access prior to his making the termination decisions. It was a report which compared budgeted costs to actual costs.[3] The BVA's were prepared by the defendant's Gadsden plant Finance Office on a monthly basis. These reports were started in 1989, about the time Allen arrived in Gadsden. The parties acknowledge that the BVA's contained at least eight line items of ERISA type benefits. The undisputed evidence is that the cost of all these benefits were allocated to divisions, not on an actual cost basis but under a system whereby total costs were distributed based on such factors as numbers of employees, square footage, etc. The item for vacation costs includes accrued, but not taken, vacation. It does not include costs of replacements for employees on vacation. Although many of the costs stated on the BVA reports were distributed costs, Allen, at the time of his decision, thought they were actual costs charged to his division.

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[3] Referred to in the testimony as BVA's.

Defendant provided, in response to plaintiffs' interrogatories, Px. 86. These combined exhibits (entitled Cost Of Fringe Benefits Per Hour, The Goodyear Tire and Rubber Company Gadsden Plant) reflect allocated costs attendant to employees at the plant. These documents were not available, as such, to Allen at the time he made his decision. They were prepared for this litigation. The exhibit reflects the following per hour totals with regard to ERISA and non-ERISA fringe benefits.

	ERISA	**Non-ERISA**
1988	$4.18	$ .14 1/2
1989	$4.42	$ .29
1990	$4.81	$ .32
1991	$5.40	$ .38

This data reflects, of course, that ERISA benefits attendant to the cost of permanent employees far exceeded non-ERISA benefit costs. The defendant is self-insured as to medical benefits. There is no funding until medical costs are incurred.

Although Allen acknowledges that the sole purpose of the layoffs was to save cost attendant to plaintiffs' employment, he denies that cost savings related to ERISA benefits was a factor in his decision. He acknowledges that he made no specific cost analysis, but just assumed that there would be a savings in payroll taxes and that the savings in payroll taxes justified the decision. According to him, he gave no consideration to ERISA benefits. While this court does not enjoy making what could be perceived as credibility choices, it goes with the territory. While Allen says that he gave no specific consideration to ERISA benefits, there are several factors which would suggest that he did, albeit not by specific analysis. Although the court does not find that Allen deliberately testified falsely, the court does conclude that because ERISA benefits were not specifically

analyzed, Allen may *now* be led to think that he gave them *no* consideration.

The factors which suggest that, more likely so than not so, Allen specifically considered the ERISA benefits include:

(1) The wide disparity between the dollar amounts attributable to ERISA benefits and those lower amounts which Allen says that he did consider.

(2) The fact that Allen saw BVA reports and thought, at the time of his decision, that the charges were actual, not distributed.

(3) The fact that the amount in hourly payments to the provider(s) for LPNs, except for benefits, was approximately the same as plaintiffs were being paid.

(4) Allen had a long time career in an area involving personnel management and likely had an awareness of the significance of benefits.

(5) The common knowledge that benefits are a significant part of an employment package.

(6) The fact that there was some pressure from above to reduce costs. Within a short time after the decisions, the company began making written benefits comparisons.

(7) There was no question about plaintiffs' work performance.

(8) The fact plaintiffs could have continued to work under the new system. Defendant retained the right to influence such decisions. There were no written contracts with the providers.

(9) Plaintiffs were not offered the opportunity to stay at reduced salary with benefits.

Relief

Plaintiffs seek enforcement pursuant to 29 U.S.C. § 1132(a)(3). 29 U.S.C. § 1140 provides that "section 1132 of this title shall be applicable in the enforcement of this section." The only portion of § 1132 which this court can conclude has application to relief or remedy is § 1132(a)(3) (§ 502(a)(3)).[4] In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 150 (1985), Justice Brennan, in a concurring opinion, stated that the Court was saving for another day "the nature and extent of the 'appropriate equitable relief . . . to redress' such violations under § 502(a)(3)."[5] The court has now answered that saved question.

In *Mertens v. Hewitt Associates*, ___ U.S. ___ (1993), the Court held that 29 U.S.C. 1132(a)(3) does not provide for the recovery of compensatory or punitive damages. While there may be Circuit court cases prior to *Mertens* which suggest to the contrary, it is not necessary for this court, in view of *Mertens*, to determine if the facts in those cases are distinguishable from those here. Note 7 in the amended decision of *McRae v. Seafarers*, 920 F.2d 819 (11th Cir. 1991), seems to have been a precursor of *Mertens*. The Eleventh Circuit rejected the argument that *Ingersol-Rand* [sic] *v. McClendon*, 111 S.Ct. 478 (1990) provided to the contrary of the ultimate holding in *Mertens*. Plaintiffs' suggestion that the majority in *Mertens* did not address the damages issue is not well taken. Even the dissenters in *Mertens* seem to suggest that punitive damages are not available under § 1132(a)(3). See dissenters' note 6 and cases cited therein. See also majority opinion, note 7.

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[4] Except, of course, for the attorney fees provisions.

[5] Justice Brennan also stated that 29 U.S.C. § 1109 protects the plan, not individuals. *Id.* Thus, the possibility that § 1109 and § 1132(a)(2) may allow for, in addition to "equitable" relief, "remedial" relied, provides no answer here. The fact that 502(a)(3) makes no reference to "remedial" relief suggests a restriction to "equitable" relief. See note 8 of the majority opinion in *Mertens, infra.*

Ultimate Findings And Conclusions

This court finds and concludes that defendant violated 29 U.S.C. § 1140 when it terminated (laid off) the plaintiffs. This conclusion is based on the court's finding that the ERISA benefits were specifically considered when the decision was made and defendant's acknowledgment that such consideration constitutes a violation. The court does not conclude that the terminations resulted solely from a consideration of ERISA, but does find that defendant specifically intended to reduce the costs of ERISA benefits. *See Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir. 1993). This case is comparable to *Seaman* in that the employees were offered an opportunity for continued association on a non-employee basis. The only basis for providing relief is 29 U.S.C. § 1132(a)(3) (except for, possibly, attorney fees).[6] *Mertens* forecloses the recovery of punitive and/or com-

[6]Plaintiffs have acknowledged that "*In Ingersol-Rand* [sic], *supra* the U.S. Supreme Court stated that 29 U.S.C. § 1132(a) is the exclusive remedy for violations of 29 U.S.C. 1140:

> In *Pilot Life* we examined this section at some length and explained that Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510,

Id. at 485.

* * *

> Of particular relevance in this inquiry is § 502(a) — ERISA's civil enforcement mechanism. That section as set forth in 29 U.S.C. §§ 1132(a)(3), provides in pertinent part:
>
> > A civil action may be brought . . . (3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.
> >
> > . . .

Id. at 485.

From the above language, the Supreme Court seems to imply that 29 U.S.C. 1132(a)(3) is the basis for relief for violation of 29 U.S.C. 1140." (Quoted from plaintiffs' brief).

pensatory damages under this section.[7] This court does not reach the issue of whether mental anguish or punitive damages would be appropriate, in any event, under these facts. The plaintiffs could have stayed employed under the new system, brought this action for relief and suffered no significant harm. They elected another route.

The court concludes that the plaintiffs should be reinstated with no loss of benefits or back pay. Since they did not mitigate their damages by remaining employed, they are not entitled to any back pay except to the extent of the difference, if any, between the amount they were earning plus any cost of living raises, etc., less what they could have eared during this period as temporary employees and what they have earned in other jobs for periods in which the amounts would have exceeded the temporary job pay to the extent of any such excess.

Within ten days, the defendant will, consistent with this opinion, file and serve a proposed judgment which includes such amounts as are contemplated by these findings and conclusions[8] and a provision for reinstatements, with benefits accrued retroactive to date of termination. In general, plaintiffs are to be made whole except to the extent, as indicated, they did not mitigate their damages. Plaintiffs will have ten days to object to the proposed judgment. There is no need for plaintiffs to object to anything which is consistent with these findings and conclu-

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[7] Cases which predate and are inconsistent with *Mertens* are neither controlling nor persuasive. The Supreme Court clearly addresses the language of § 1132(a)(3). Plaintiffs' attorney is persistent. He represented the plaintiff in *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988). The trial court found a violation of 29 U.S.C. § 1140, but held that *no* provision of § 1132 provides for the recovery of extra-contractual damages. *Mertens* simply puts the icing on the *Bishop cake*. Plaintiffs have inextricably argued that Bishop "has no meaning" to a § 1140 claim.

[8] The court places this burden on defendant because, initially, it may be in a better position to calculate the amounts.

sions, only as to amounts, etc. which are arguably inconsistent herewith.

This 21st day of October, 1993.

/s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES
DISTRICT JUDGE